Supreme Court, U.S.
FILED
JUN 18 2002
OFFICE OF THE CLERK

(3)

No. 01-1340

In the Supreme Court of the United States

ARNOLD F. HOHN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR PETITIONER

CHARLES A. ROTHFELD
EILEEN PENNER
ROBERT L. BRONSTON
Counsel of Record
Mayer, Brown, Rowe & Maw
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

Counsel for Petitioner

4P3

REPLY BRIEF FOR THE PETITIONER

In its Brief for the United States ("U.S. Br."), the government "agrees" with petitioner Arnold Hohn that "the court of appeals' decision conflicts with decisions of this Court" (U.S. Br. 9) and that the jurisdictional analysis adopted by the Eighth Circuit "cannot be reconciled" with this Court's cases emphasizing that a challenge to a criminal conviction can ***never*** be moot when the conviction could be used to subject the petitioner to an enhanced sentence for a subsequent crime. U.S. Br. 11 (citing *Evitts* v. *Lucey*, 469 U.S. 387 (1985); *Pennsylvania* v. *Mimms*, 434 U.S. 106 (1977); *Benton* v. *Maryland*, 395 U.S. 784 (1969); *Sibron* v. *New York*, 392 U.S. 40 (1968)).

When the United States confesses error, this Court's typical practice is to enter an order granting the writ of certiorari, vacating the judgment below, and remanding the case for further proceedings in light of the government's new position ("GVR"). See ROBERT L. STERN, EUGENE GRESSMAN, STEPHEN M. SHAPIRO & KENNETH S. GELLER, SUPREME COURT PRACTICE 248-249 (7th ed. 1993). That is the disposition requested by the Solicitor General in this case. See U.S. Br. 17.

While Hohn appreciates the government's confession of error, he respectfully disagrees with the government's proposed disposition of this case. The government's suggestion of GVR in light of the government's changed position would be appropriate in the great run of cases, in which the parties' agreement on the question presented would be binding on remand on the court of appeals. This case, however, involves an issue of subject-matter jurisdiction, in which the agreement of the parties would ***not*** be binding on the court below.

The government's proposed disposition would place the case back before the Eighth Circuit with the parties in agreement that Hohn's case is justiciable. But that was precisely the situation confronting the court below following

briefing on the merits. Notwithstanding both parties' insistence that jurisdiction was present, the court decided to "disagree" (Pet. App. 11a) and dismiss the case as moot. In the absence of some indication to the Eighth Circuit that its analysis disregarded this Court's precedent — and a GVR order would not necessarily convey that message — there is a significant danger that the court will simply reapply its departure from the governing rule of law on remand.

For that reason, petitioner submits that the proper disposition in this case is a summary reversal pursuant to Rule 16.1. Only a summary reversal will ensure that the court below applies the correct rule of law on remand and in subsequent cases. The government's brief also indicates that there are at least "two published court of appeals' decisions holding that a collateral attack on a criminal conviction was moot because there was no possibility of collateral consequences from the conviction." U.S. Br. 14 (citing *Malloy* v. *Purvis*, 681 F.2d 736 (11th Cir. 1982); *Broughton* v. *North Carolina*, 717 F.2d 147 (4th Cir. 1983)). While the government argues that Hohn's case does not merit full briefing and argument on the questions presented, it acknowledges the existence of precedent from the Fourth and Eleventh Circuits that should not be followed. Again, only a summary reversal in this case — in which the Court expresses its disapproval of those precedents — can eliminate the danger of that occurrence as well.

The parties agree that the jurisdictional analysis employed by the Eighth Circuit below disregarded this Court's precedent. A summary reversal is necessary to ensure that the error engaged in by the court below and by other courts of appeals does not recur. Thus, petitioner Arnold Hohn respectfully requests that this Court summarily reverse the decision below and confirm its longstanding precedent that a challenge to a criminal conviction can never be moot when the challenged

conviction could be used to enhance the sentence for a subsequent offense.

CONCLUSION

For the reasons set forth above, the petition should be granted, and the decision below should be summarily reversed.

Respectfully submitted.

CHARLES A. ROTHFELD
EILEEN PENNER
ROBERT L. BRONSTON
Counsel of Record
Mayer, Brown, Rowe & Maw
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3244

Counsel for Petitioner

JUNE 2002